



# **Monitoring Review of Brazoria County's Indigent Defense Systems**

**June 2022**



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**Mission:** Protecting the right to counsel, improving public defense

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## Executive Summary

The Texas Indigent Defense Commission (TIDC) monitors local jurisdictions' compliance with the Fair Defense Act through on-site reviews.<sup>1</sup> TIDC observed court, interviewed officials, and reviewed FY2019 data from Brazoria County.<sup>2</sup> This report details twelve findings of noncompliance.

In adult cases, TIDC found that few defendants requested counsel at the Article 15.17 hearing. In their monthly Judicial Council Monthly Court Activity Reports, five justices of the peace reported zero requests for counsel over the course of FY2019. Some of these reports were not accurate (Finding 12), but TIDC found that defendants were not always asked whether they wanted to request counsel (Finding 1). When defendants requested counsel at the Article 15.17 hearing, reasonable assistance in filling out forms was not provided at the time of the hearing (Finding 2).

Local determinations of indigence can be problematic and are sometimes based on the income of persons who are not legally bound to pay the defendant's legal expenses (Finding 4). Many defendants are found to be partially indigent. In felony cases, counsel is immediately appointed for partially indigent defendants, but in misdemeanor cases, counsel is appointed after the defendant pays a \$100 fee. Defendants frequently cannot pay this fee, and those appointments of counsel are either delayed or never made. Some defendants found to be partially indigent later entered uncounseled pleas (Finding 5).

In some misdemeanor proceedings, courts used an attorney-for-the-day. The attorney-for-the-day is not described in the indigent defense plan (Finding 7). The attorney-for-the-day may establish an attorney-client relationship with defendants who appear at the docket without counsel, but the representation does not continue beyond the hearing (Finding 6). Article 26.04(j)(2) of the Code of Criminal Procedure requires an attorney appointed to an adult criminal case continue representing the defendant through disposition unless the court makes a finding of good cause. Additionally, Article 1.051(a) requires that, once appointed, attorneys be given sufficient time to adequately prepare for a proceeding.

In juvenile cases, most appointments went to attorneys-for-the-day. Some of these attorneys-for-the-day were not approved for a juvenile list (Finding 8). Appointments to juvenile attorneys were not evenly distributed, and this is largely attributable to the use of the attorney-for-the-day (Finding 11).

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<sup>1</sup> TEX. GOV'T CODE § 79.037(a)–(b).

<sup>2</sup> TIDC began the review during 2020, but covid-related issues delayed the completion of the review.

Brazoria County uses the Office of Indigent Defense to screen defendants for indigence. Having a dedicated office for handling counsel requests is an efficient way to promptly rule on all requests for counsel, but breakdowns appeared in two places. First, when defendants request counsel at the Article 15.17 hearing, TIDC did not observe any process to ensure requests are promptly sent to the Office of Indigent Defense (Finding 3). Second, partial indigence determinations in misdemeanor cases rarely result in the timely appointment of counsel. As a result, TIDC’s review of sample cases showed felony cases met our presumptive level of timeliness, but misdemeanor cases did not meet this presumptive level (Finding 9). In some instances, misdemeanor defendants entered uncounseled pleas without the original request having been ruled upon (Finding 10).

TIDC thanks Brazoria County officials and staff for their assistance in completing this review. TIDC staff stand ready to provide technical and financial assistance to remedy these issues. TIDC will conduct a follow-up review regarding its noncompliance findings within two years.<sup>3</sup>

## **Background**

The Texas Indigent Defense Commission (TIDC) monitors the compliance of local jurisdictions with the Fair Defense Act (FDA) through on-site reviews.<sup>4</sup> These reviews are conducted to promote local compliance and accountability with the requirements of the Fair Defense Act and to provide technical assistance to improve county indigent defense processes.

This review covered all six core requirements of the FDA:<sup>5</sup>

- REQUIREMENT 1: CONDUCT PROMPT AND ACCURATE ARTICLE 15.17 PROCEEDINGS
- REQUIREMENT 2: DETERMINE INDIGENCE ACCORDING TO STANDARDS DIRECTED BY THE INDIGENT DEFENSE PLAN
- REQUIREMENT 3: ESTABLISH MINIMUM ATTORNEY QUALIFICATIONS
- REQUIREMENT 4: APPOINT COUNSEL PROMPTLY
- REQUIREMENT 5: INSTITUTE A FAIR, NEUTRAL, AND NONDISCRIMINATORY ATTORNEY SELECTION PROCESS
- REQUIREMENT 6: REPORT DATA REQUIRED BY STATUTE

TIDC staff members Wesley Shackelford, Lindsay Bellinger, Claire Buetow, and Joel Lieurance conducted the review in person and virtually. TIDC examined FY2019 data, including misdemeanor and felony case files; summary juvenile

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<sup>3</sup> Title 1 TEX. ADMIN. CODE § 174.28(c)(2).

<sup>4</sup> TEX. GOV'T CODE § 79.037(a)–(b).

<sup>5</sup> 1 TEX. ADMIN. CODE § 174.28.

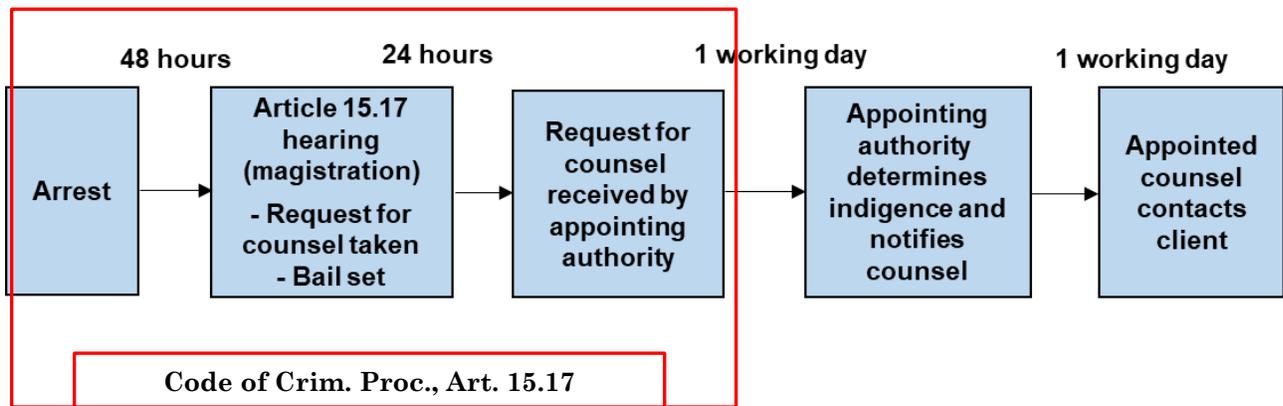
records examined by county staff; the local indigent defense plan; appointment lists; and records of attorney continuing legal education (CLE) hours. TIDC interviewed judges and court staff and observed Article 15.17 hearings, felony dockets, and misdemeanor dockets.

## Program Assessment

### REQUIREMENT 1: CONDUCT PROMPT AND ACCURATE ARTICLE 15.17 PROCEEDINGS

Under Article 15.17 of the Code of Criminal Procedure, an arrested person must be brought before a magistrate within 48 hours.<sup>6</sup> At this hearing, the magistrate must inform the person of the right to counsel and procedures for requesting counsel. If the person requests appointed counsel, the magistrate must ensure the person has reasonable assistance in completing the necessary forms for requesting counsel.<sup>7</sup> Magistrates must transmit requests for counsel to the appointing authority within 24 hours.<sup>8</sup> If a person is arrested on an out-of-county warrant, the magistrate must perform the same duties as if the person were arrested on an in-county warrant.<sup>9</sup>

**Figure 1a: Timeline for Appointment of Counsel in Adult Criminal Cases**



<sup>6</sup> TEX. CODE CRIM. PROC. art. 15.17(a).

<sup>7</sup> TEX. CODE CRIM. PROC. art. 15.17(a).

<sup>8</sup> TEX. CODE CRIM. PROC. art. 15.17(a).

<sup>9</sup> TEX. CODE CRIM. PROC. art. 15.18(a). A list of contacts to send out-of-county requests is available at: <http://tidc.tamu.edu/public.net/Reports/OutOfCountyArrestContacts.aspx>.

*Local Practices for Conducting Magistrate Warnings*

**1.a. Timeliness of Warnings**

An arrested person must be brought before a magistrate within 48 hours of arrest.<sup>10</sup> TIDC presumes a county is in substantial compliance with the prompt magistration requirement if at least 98% of Article 15.17 hearings are conducted within 48 hours.<sup>11</sup> To determine the timeliness of Article 15.17 warnings in Brazoria County, TIDC staff examined 428 sample case files in which staff could determine the time from arrest until the Article 15.17 hearing.<sup>12</sup> All but two sample cases had Article 15.17 hearings occurring within two days of arrest, indicating Brazoria County is providing warnings in a timely manner (*See* Table 1).

**Table 1: Timeliness of Article 15.17 Hearings**

	<b>Sample Size</b>	<b>Percent</b>
Article 15.17 hearing occurs x days after arrest:	428	
0 days	146	34.1%
1 day	272	63.6%
2 days	8	1.9%
<b>Timely Hearings</b>	<b>426</b>	<b>99.5%</b>
More than 2 days	2	0.5%

**1.b. Ability of Arrested Persons to Request Counsel**

At the Article 15.17 hearing, the magistrate must inform arrested persons of the right to counsel, ask whether they want to request counsel, and record whether they request counsel.<sup>13</sup> According to monthly reports to the Office of Court Administration (OCA) for FY2019, less than 1% of misdemeanor arrestees and only 1% of felony arrestees requested counsel. Several justices of the peace reported receiving no requests for counsel.

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<sup>10</sup> TEX. CODE CRIM. PROC. art. 15.17(a).

<sup>11</sup> 1 TEX. ADMIN. CODE § 174.28(c)(1). Article 15.17(a) requires magistrate warnings occur within 48 hours of arrest. To simplify time measurement, TIDC assumes warnings are timely if they occur within 2 days of arrest.

<sup>12</sup> TIDC excluded cases in which it could not determine timeliness from this analysis.

<sup>13</sup> TEX. CODE CRIM. PROC. art. 15.17(a), (e).

**Table 2: FY2019 Requests for Counsel as Reported to OCA<sup>14</sup>**

	<b>Misd. Requests</b>	<b>Misd. Warnings</b>	<b>% Misd. Requests</b>	<b>Fel. Requests</b>	<b>Fel. Warnings</b>	<b>% Fel. Requests</b>
JP1-1	18	1,531	1.2%	30	853	3.5%
JP1-2	0	691	0.0%	0	417	0.0%
JP2-1	0	883	0.0%	0	440	0.0%
JP2-2	0	1,021	0.0%	0	668	0.0%
JP3-1	0	1,243	0.0%	0	701	0.0%
JP3-2	0	1,296	0.0%	0	841	0.0%
JP4-1	1	514	0.2%	0	335	0.0%
JP4-2	8	499	1.6%	15	333	4.5%
<b>Total</b>	<b>27</b>	<b>7,678</b>	<b>0.4%</b>	<b>45</b>	<b>4,588</b>	<b>1.0%</b>

TIDC examined sample case files and found a slightly higher request rate (6% in felony cases and 3% in misdemeanor cases). Statewide, justices of the peace reported that 41% of felony arrestees and 34% of misdemeanor arrestees requested counsel at the Article 15.17 hearing.<sup>15</sup> Based on data reported to OCA and on case sample statistics, few persons in Brazoria County request counsel at the Article 15.17 hearing.

TIDC observed Article 15.17 hearings on three separate occasions.<sup>16</sup> Magistrates advised defendants as a group of their right to counsel and their right to request an attorney if they cannot afford to hire one. Magistrates did not always ask defendants whether they would like to request counsel or permit them an opportunity to fill out the proper forms at the time of the hearing.<sup>17</sup> Instead, magistrates asked defendants if they had an attorney or could afford an attorney. Magistrates explained that defendants could request counsel later.

Article 15.17(e) of the Code of Criminal Procedure requires magistrates to ask and record whether each defendant requests counsel. Brazoria County magistrates must ask and record whether each defendant requests counsel.

<sup>14</sup> Under 1 TEX. ADMIN. CODE § 171.7, justices of the peace are required to make monthly reports to OCA as part of their Judicial Council Monthly Court Activity Reports.

<sup>15</sup> These statistics covered the fiscal year from October 2018 to September 2019 and can be accessed at: <https://card.txcourts.gov/ReportSelection.aspx>.

<sup>16</sup> TIDC observed Article 15.17 hearings on June 28, July 9, and July 12, 2021.

<sup>17</sup> In two of the three Article 15.17 hearings, magistrates did not ask defendants whether they wanted to request counsel. In the third hearing, the magistrate asked defendants if they wanted to request counsel, but explained that only defendants who had no job or any money would qualify.

***1.c. Reasonable Assistance in Completing Forms for Requesting Counsel***

At the Article 15.17 hearing, a magistrate must ensure each arrested person requesting counsel has reasonable assistance in completing the necessary forms at the time of the hearing.<sup>18</sup> In all three of the Article 15.17 hearings observed, defendants were not provided with reasonable assistance in completing the necessary forms at the time of the hearing. Two magistrates did not provide people with the necessary forms but instead advised them to request them once they were “housed on the pod” that evening. A third magistrate provided people who requested counsel with the requisite form but told them that they would not be provided with a pen to fill it out until they were housed later that evening. If a defendant requests counsel, under Article 15.17(a), the magistrate must ensure reasonable assistance is provided in completing the forms necessary for requesting counsel.

***1.d. Transmitting Forms to the Appointing Authority***

Within 24 hours of a person requesting counsel, the magistrate must transmit the request to the entity authorized to appoint counsel.<sup>19</sup> For persons arrested on out-of-county warrants, the magistrate must transmit the request to the warrant issuing county.<sup>20</sup> For those defendants able to request counsel at the Article 15.17 hearing, TIDC did not observe any process for transmitting those requests to the appointing authority within 24 hours.

**FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 1**

**Conduct prompt and accurate magistration proceedings**

**FINDING AND RECOMMENDATION 1:** Article 15.17(e) of the Code of Criminal Procedure requires magistrates to ask and record whether each defendant requests counsel. Brazoria County magistrates must ask and record whether each defendant requests counsel.

**FINDING AND RECOMMENDATION 2:** If a defendant requests counsel, under Article 15.17(a), the magistrate must ensure reasonable assistance is provided in completing the forms necessary for requesting counsel.

**FINDING AND RECOMMENDATION 3:** Under Article 15.17(a), requests for counsel must be transmitted to the appointing authority within 24 hours. For those defendants able to request counsel at the Article 15.17 hearing, TIDC did not observe any process for transmitting those requests to the appointing authority within 24 hours.

<sup>18</sup> TEX. CODE CRIM. PROC. art. 15.17(a).

<sup>19</sup> TEX. CODE CRIM. PROC. art. 15.17(a).

<sup>20</sup> TEX. CODE CRIM. PROC. art. 15.18 (a-1).

## **REQUIREMENT 2: DETERMINE INDIGENCE ACCORDING TO STANDARDS DIRECTED BY THE INDIGENT DEFENSE PLAN**

Under Article 26.04(l) of the Code of Criminal Procedure, counties must adopt procedures and financial standards for determining whether a defendant is indigent. Article 26.04(m) lists the factors courts may consider in determining indigence.

In determining whether a defendant is indigent, the court or the courts' designee may consider the defendant's income, source of income, assets, property owned, outstanding obligations, necessary expenses, the number and ages of dependents, and spousal income that is available to the defendant. The court or the courts' designee may not consider whether the defendant has posted or is capable of posting bail, except to the extent that it reflects the defendant's financial circumstances as measured by the considerations listed in this subsection.

The local standards for determining indigence are set in each county's indigent defense plans. The ultimate test is whether the defendant is financially able to employ counsel.<sup>21</sup> Under Brazoria County's indigent defense plan, some defendants may not meet the presumption under the local standard set in the plan, but still not have the financial ability to employ counsel.

### ***2.a. Indigence Determinations in Adult Criminal Cases***

For adult criminal cases in Brazoria County, persons are presumed indigent if they have a household income at or below 125% of the Federal Poverty Guidelines and non-exempt assets less than \$2,500.<sup>22</sup> Persons can also be considered indigent if they meet any of the following factors: (1) at the time of the request, they have been determined to be eligible to receive food stamps, Medicaid, Temporary Assistance for Needy Families, Supplemental Security Income, or public housing; (2) they are serving a sentence in a correctional facility or are residing in a mental health facility; or (3) they are unable to retain counsel without substantial hardship to the defendant or defendant's dependents.

#### *Factors to Determine Indigence*

As part of its file review, TIDC examined documents directing defendants to bring documents to prove their indigence to the next court appearance. One additional document that defendants may be required to bring is pay stubs of the defendant's spouse or live-in companion. Article 26.04(m) of the Code of Criminal

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<sup>21</sup> TEX. CODE CRIM. PROC. ART. 1.051(b).

<sup>22</sup> The Brazoria District and County Court Indigent Defense Plan is available at: <http://tidc.tamu.edu/IDPlan/ViewPlan.aspx?PlanID=179>.

Procedure lists the factors courts may consider in determining indigence.<sup>23</sup> The list includes spousal income that is available to the defendant but does not include the income of any other persons, except the defendant. Additionally, *Abdnor v. State*, 712 S.W.2d 136 (Tex. Crim. App. 1986), restricts indigence determinations to considering the income of only the persons who are legally bound to pay for the defendant's legal expenses.

### *Partial Indigence*

In Brazoria County, defendants may be found to be partially indigent if they make between 125% and 175% of the Federal Poverty Guidelines and have non-exempt assets less than \$2,500. A person must pay \$250 in felony cases and \$100 in misdemeanor cases. If the felony courts find a person to be partially indigent, but the person cannot pay the \$250 fee, counsel is immediately appointed, and the \$250 is assessed against the defendant.

In misdemeanor cases, the person must pay the \$100 before the court appoints counsel.<sup>24</sup> Defendants who are unable to pay the \$100 fee are given 15 days to pay the fee and receive appointed counsel. Article 1.051(b) defines "indigent" as a person who is not financially able to employ counsel. The indigent defense plan also provides that a defendant who does not meet the specific financial standards "shall nevertheless be determined indigent if the defendant is otherwise unable to retain private counsel without substantial hardship to the defendant or the defendant's dependents." If a defendant is unable to pay the \$100 misdemeanor fee, it is an indication the defendant is also unable to employ counsel. Nevertheless, such defendants are not appointed counsel under current practice. Alternatively, the court could appoint counsel in these cases and assess fees that the defendant is able to repay as permitted by Article 26.05(g) as is done in felony cases.

In most sample misdemeanor cases, courts ultimately appointed counsel for partially indigent defendants, but at a later time than the counsel request. In two sample cases, the courts found persons to be partially indigent but never appointed counsel. Those two persons entered uncounseled pleas.

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<sup>23</sup> Article 26.04(m) states:

In determining whether a defendant is indigent, the court or the courts' designee may consider the defendant's income, source of income, assets, property owned, outstanding obligations, necessary expenses, the number and ages of dependents, and spousal income that is available to the defendant. The court or the courts' designee may not consider whether the defendant has posted or is capable of posting bail, except to the extent that it reflects the defendant's financial circumstances as measured by the considerations listed in this subsection.

<sup>24</sup> For detained defendants, the \$100 fee is automatically waived, and is periodically waived for bonded defendants.

*Attorney-for-the-Day*

The misdemeanor courts periodically use an attorney-for-the-day. Under this system, an attorney may represent defendants without counsel, but the representation does not begin prior to a docket or extend beyond the docket. Based on court observations and interviews, an attorney-for-the-day speaks with unrepresented defendants at court dockets. The attorney-for-the-day serves both an administrative role and a legal role. For the administrative role, the attorney explains the process for requesting court appointed counsel to defendants. For the legal role, the attorney may perform the following actions:

- 1) Advise defendants as to whether they should speak to the prosecutor;
- 2) Advise defendants of standard plea offers; and
- 3) Convey prosecutorial offers to defendants.

TIDC heard differing accounts as to whether the attorney-for-the-day assists defendants with plea paperwork. Following the docket, the attorney-for-the-day does not continue representing a particular defendant.

When an attorney-for-the-day establishes an attorney-client relationship with a defendant, the attorney does not provide the same services as a typical appointment of counsel. In practice, the relationship does not extend beyond a specific docket. As required by Article 26.04(j)(2), all appointments of counsel must allow for the attorney to represent the client through case disposition (unless the attorney withdraws after a finding of good cause is entered on the record). Additionally, Article 1.051(a) requires that, once appointed, attorneys be given sufficient time to adequately prepare for a proceeding.

***2.b. Indigence Determinations in Juvenile Cases***

The standard of indigence in juvenile cases is the same as in adult criminal cases but the standard is based on the person responsible for supporting the youth.<sup>25</sup>

**FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 2**

**Determination of Indigence**

**FINDING AND RECOMMENDATION 4:** Indigence determinations must comply with Article 26.04(m) and *Abdnor v. State*. Indigence determinations may not consider the income of persons who are not legally bound to pay for the defendant’s legal expenses.

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<sup>25</sup> The Brazoria Juvenile Board Plan is available at <http://tidc.tamu.edu/IDPlan/ViewPlan.aspx?PlanID=161>.

**FINDING AND RECOMMENDATION 5:** In misdemeanor cases, courts do not appoint counsel for defendants who they found to be partially indigent but who report they are unable to pay the \$100 fee, indicating they are also unable to retain counsel. If the courts find a defendant is unable to retain counsel, the courts must appoint counsel for the defendant.

**FINDING AND RECOMMENDATION 6:** In misdemeanor cases, an attorney-for-the-day is periodically used. When the attorney-for-the-day is used, the courts must ensure the attorney continues to represent the defendant until the case is disposed or the court finds good cause on the record for the attorney to withdraw from the case.

### **REQUIREMENT 3: ESTABLISH MINIMUM ATTORNEY QUALIFICATIONS**

Under Article 26.04(d) of the Code of Criminal Procedure, private attorneys wishing to take court appointments must apply to be on an appointment list. The list must contain objective qualifications, including a minimum annual continuing legal education (CLE) requirement of at least six hours per year in criminal or juvenile law.<sup>26</sup> Assigned counsel attorneys must be approved by a majority of judges presiding over criminal and juvenile cases.

#### ***3.a. Felony and Misdemeanor Cases***

All felony and misdemeanor attorneys who take court appointments must be board certified in criminal law or must obtain at least 10 criminal CLE hours annually. The courts approve attorneys for various offense levels. Higher offense levels require a greater number of trials and years of experience in criminal litigation than lower levels. Appeals cases are delineated according to experience and number of appellate briefs. In many counties, the courts have appointment lists designated for attorneys who speak languages other than English. The courts in Brazoria County noted a need for such a list, but spoke of difficulties attracting attorneys who speak multiple languages.

Attorneys must initially apply to be on the list and be approved by a majority of the judges. After being approved for lists, attorneys must annually submit a shorter certification form.

The misdemeanor courts sometimes use an attorney-for-the-day. The attorney-for-the-day is not described in the indigent defense plan. If the courts intend to use the attorney-for-the-day in adult criminal cases, it must comply with

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<sup>26</sup> Title 1 TEX. ADMIN. CODE §§ 174.1 – 4. Attorneys may be Board Certified in criminal or juvenile law in lieu of the annual CLE requirement.

continuity of representation requirements, and its use must be described in the local indigent defense plan.

**Table 3: Qualifications for Adult Criminal Appointment List Levels**

<b>List</b>	<b>Years Experience</b>	<b># of Trials as Lead Counsel or # of App. Briefs</b>	<b>Other Notes<sup>27</sup></b>
Capital Murder – Death Sought (1 <sup>st</sup> Chair)	n/a	n/a	Approved capital murder list - 2 <sup>nd</sup> Admin. Region.
Capital Murder – Death Sought (2 <sup>nd</sup> Chair)	5	8 – 1 <sup>st</sup> or 2 <sup>nd</sup> degree felony jury trials in last 5 years	Approved 2 <sup>nd</sup> chair list - 2 <sup>nd</sup> Admin. Region
Capital Murder – No Death	5	8 felony jury trials in last 5 years (no SJFs)	
1 <sup>st</sup> Degree Felony	4	4 felony jury trials in last 10 years	
2 <sup>nd</sup> Degree Felony	3	2 felony jury trials in last 10 years	
3 <sup>rd</sup> Degree Felony / State Jail Felony	1	3 crim. jury trials in last 5 years (no Class Cs)	
Misdemeanors	n/a	1 felony trial or 2 misd. Trials (no Class Cs)	2 <sup>nd</sup> chair option
Capital Murder – Death Appeal	n/a	n/a	Approved capital murder appeals list - 2 <sup>nd</sup> Admin. Region.
Capital Murder – No Death Appeal	n/a	5 appellate briefs in last 7 years	
1 <sup>st</sup> and 2 <sup>nd</sup> Degree Appeals	3	2 appellate briefs in last 5 years	
3 <sup>rd</sup> Degree and State Jail Appeals	2	1 appellate brief in last 5 years	
Misdemeanor Appeals	2	1 appellate brief in last 5 years	2 <sup>nd</sup> chair option

### **3.b. Juvenile Cases**

All juvenile attorneys who take court appointments must be board certified in criminal or juvenile law or obtain at least 10 criminal or juvenile CLE hours annually with 6 hours in juvenile law. Like adult cases, higher offense levels require greater experience and number of trials. Appellate cases are delineated according to experience and number of appellate briefs.

The courts hearing juvenile matters include the use of an attorney-for-the-day in their indigent defense plan. The indigent defense plan states:

The use of the attorney for the day shall be limited to less serious offenses such as misdemeanors, children in need of supervision, contempt of court and such other non—aggravated felony charges or non sex offender

<sup>27</sup> Board certified attorneys can qualify for all lists, except 2<sup>nd</sup> Administrative Region death penalty and death penalty appeals lists.

registration charges as the Court may deem appropriate in the circumstances.

While the attorney-for-the-day is limited to less serious offenses, these attorneys are used in many more cases than other juvenile attorneys. Judges noted that it has been difficult for them to find attorneys willing to take juvenile attorney-for-the-day assignments.

**Table 4: Qualifications for Juvenile Appointment List Levels**

<b>List</b>	<b>Years Experience</b>	<b># of Trials as Lead Counsel or # of App. Briefs</b>	<b>Other Notes</b>
Juvenile – Capital Murder Alleged	5	8 felony trials in last 5 years (no SJFs)	
Juvenile – 1 <sup>st</sup> Degree Felony	4	4 felony trials in last 10 years	
Juvenile – 2 <sup>nd</sup> Degree Felony	3	2 felony trials in last 10 years	
Juvenile – 3 <sup>rd</sup> Degree or State Jail Felony	1	3 crim. trials in last 5 years (no Class Cs)	
Juvenile - CINS	n/a	1 felony trial	2 <sup>nd</sup> chair option
Juvenile – Capital Murder Appeal	n/a	5 – crim./juv. briefs in last 7 years	
Juvenile – 1 <sup>st</sup> or 2 <sup>nd</sup> Degree Appeal	3	2 – crim./juv. briefs in last 5 years	
Juvenile – All other Appeals	2	1 – crim./juv. briefs in last 5 years	2 <sup>nd</sup> chair option

The judges could not recall all attorneys who acted as in the attorney-for-the-day capacity. However, several attorneys that were identified as having acted as juvenile attorney-for-the-day were not approved for any juvenile appointment list. Article 26.04(a) requires the court to appoint attorneys from a public appointment list. The juvenile courts must only appoint attorneys who were approved for a juvenile appointment list.

FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 3

**Establish Minimum Attorney Qualifications**

**FINDING AND RECOMMENDATION 7:** In misdemeanor cases, the attorney-for-the-day is not described in the indigent defense plan. If the courts intend to use the attorney-for-the-day in adult criminal cases, the courts must describe its use in the local indigent defense plan.

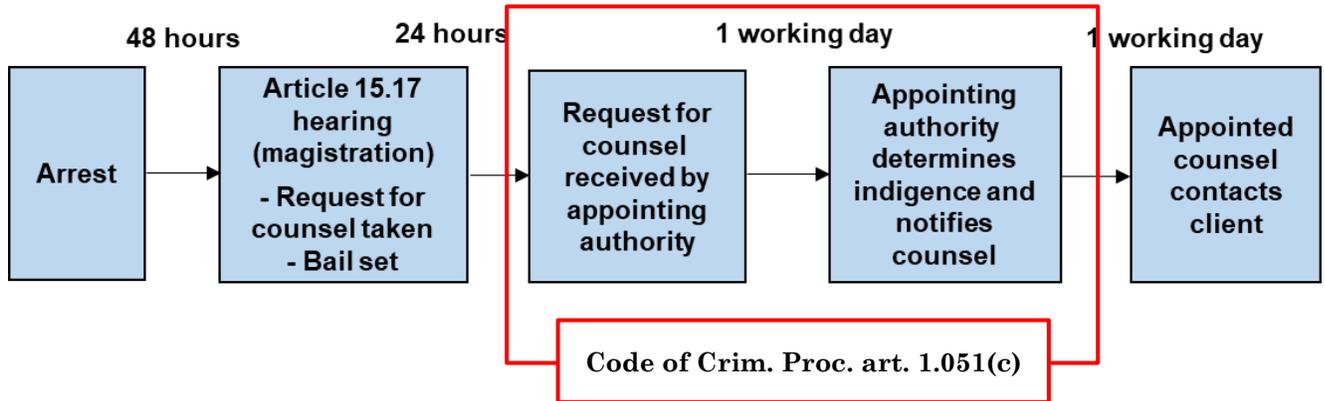
**FINDING AND RECOMMENDATION 8:** Several attorneys acting as juvenile attorney-for-the-day were not approved for any juvenile appointment list. Article 26.04(a) requires the court to appoint attorneys from a public appointment list. The juvenile courts must only appoint attorneys who were approved for a juvenile appointment list.

**REQUIREMENT 4: APPOINT COUNSEL PROMPTLY**

*Adult Cases*

Under Article 1.051(c) of the Code of Criminal Procedure, courts in counties with a population over 250,000 must rule on a request for counsel within one working day of receiving the request.

**Figure 1b: Timeline for Appointment of Counsel in Adult Criminal Cases**



Under Article 15.17 and local procedures, the first opportunity for most defendants to request counsel is at the Article 15.17 hearing, when a defendant appears before a magistrate and is informed of the charges. If a defendant makes bail before the Article 15.17 hearing (or is never brought before a magistrate), the defendant has the first opportunity to request counsel at the initial appearance in the trial court.

Brazoria County uses an Office of Indigent Defense to screen defendants requesting counsel. If a defendant is in jail and requests counsel, the completed affidavit of indigence is emailed to the office. If a defendant is out of jail, the defendant can schedule a time to be interviewed by the Office on Indigent Defense. TIDC has observed that counties that have offices devoted to screening are more capable of appointing counsel in a timely manner. If there is no central point of contact for taking and ruling on requests, many requests are lost.

To assess the timeliness of local appointment procedures, TIDC examines case files and measures the time from counsel request until appointment of counsel. This review examined cases filed in FY2019 (October 2018 to September 2019).

**4.a. Timeliness of Appointment in Felony Cases**

TIDC examined 210 sample felony cases filed in FY2019. The County made timely appointments in 132 of 142 cases having a request for counsel (**93% timely**). This exceeds TIDC’s 90% threshold for presuming a jurisdiction’s practices ensure timely appointment of counsel. Most cases in which indigence determinations were not timely occurred when defendants requested counsel at the Article 15.17 hearing. If a greater percentage of defendants request counsel at the Article 15.17 hearing, the timeliness of felony appointments could fall, if processes are not implemented to timely transmit and rule on such requests. TIDC will continue to track the timeliness of felony appointments to ensure that changes to the Article 15.17 hearing do not disrupt the timely appointment of counsel.

**Table 5: Times to Appointment in Felony Cases**

	Sample Size	Number from sample	Percent
Number of case files examined	210		
Total cases with a counsel request		142	
<b>Appointment / denial of indigence occurred in:</b>			
0 work days		130	
1 work day + 24 hour transfer		2	
<b>Total timely appointments / denials</b>		<b>132</b>	<b>93%</b>
2 - 4 work days + 24 hour transfer		3	
More than 4 work days + 24 hour transfer		7	
No ruling on request		0	
Total untimely appointments / denials		10	7%

#### ***4.b. Timeliness of Appointments in Misdemeanor Cases***

TIDC examined 295 sample misdemeanor cases filed in FY2019. The County made timely appointments in 80 of 106 cases having a request for counsel (**75% timely**). This falls below TIDC’s 90% threshold for presuming a jurisdiction’s practices ensure timely appointment of counsel. When counsel was appointed in a timely manner, it was always on the day of the request. When the County did not immediately appoint counsel or deny indigence, appointments were either late or did not happen. The County must implement practices that satisfy Article 1.051(c)(2)’s timeline in misdemeanor cases.

In some instances, defendants requested counsel but were told to bring back certain documents at the next court docket to prove indigence. These documents included copies of paystubs, paystubs of a spouse or live-in companion, and tax returns with accompanying W-2 forms. If the court requires defendants to show proof of indigence with additional documents, the appointment of counsel or denial of indigence cannot be delayed beyond the one-working-day standard set in Article 1.051(c)(2).

In other instances, defendants were found to be partially indigent, but the appointment of counsel was delayed for 15 days, until the defendant could pay \$100 toward attorney fees. These appointments are later than required by Article 1.051(c)(2). One option would be to appoint counsel for those defendants found partially indigent and to assess fees that the defendant is able to repay.

**Table 6: Times to Appointment in Misdemeanor Cases**

	Sample Size	Number from sample	Percent
Number of case files examined	295		
Total cases with a counsel request		106	
<b>Appointment / denial of indigence occurred in:</b>			
0 work days		80	
1 work day + 24 hour transfer		0	
<b>Total timely appointments / denials</b>		<b>80</b>	<b>75%</b>
2 to 4 work days + 24 hour transfer		2	
More than 4 work days + 24 hour transfer		9	
No ruling on request		15	
Total untimely appointments / denials		26	25%

#### ***Waivers of Counsel in Misdemeanor Cases***

Article 1.051 of the Code of Criminal Procedure addresses waivers of counsel and allows waivers that are voluntarily and intelligently made. Under Article

1.051(f-1), the prosecutor may not initiate a waiver and may not communicate with a defendant until any pending request for counsel is denied, and the defendant waives the opportunity to retain private counsel. Under Article 1.051(f-2), the court must explain the procedures for requesting counsel to an unrepresented defendant and must give the defendant a reasonable opportunity to request counsel before encouraging the defendant to communicate with the attorney representing the state. If a defendant enters an uncounseled plea, the defendant must sign a written waiver, the language of which must substantially conform to the language of Article 1.051(g).<sup>28</sup>

TIDC found 11 sample cases in which misdemeanor defendants requested counsel at the Article 15.17 hearing and later waived counsel and entered uncounseled pleas without their requests being ruled upon. The absence of a ruling on a pending request raises the possibility of several statutory violations, including untimeliness (Art. 1.051(c)) and invalid waiver of counsel (Art. 1.051(f-2)). Brazoria County must ensure that its procedures for ruling on counsel requests meet the requirements of both Article 1.051(c) and 1.051(f-2).

#### ***4.c. Juvenile Cases***

Counsel must be appointed for youths alleged to have engaged in delinquent conduct when the youth is brought to a detention hearing and when the youth is served with a copy of the petition alleging misconduct.<sup>29</sup> Under Section 54.01(b-1) of the Family Code, unless the court finds the appointment of counsel is not feasible due to exigent circumstances, the court shall appoint counsel within a reasonable time before the first detention hearing. Under Subsections 51.101(c) and (d) of the Family Code, once a petition is served on the youth, the court has five working days to appoint counsel or order the retention of counsel for the youth.<sup>30</sup>

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<sup>28</sup> The waiver language of Article 1.051(g) states:

"I have been advised this \_\_\_\_\_ day of \_\_\_\_\_, 2\_\_\_\_, by the (name of court) Court of my right to representation by counsel in the case pending against me. I have been further advised that if I am unable to afford counsel, one will be appointed for me free of charge. Understanding my right to have counsel appointed for me free of charge if I am not financially able to employ counsel, I wish to waive that right and request the court to proceed with my case without an attorney being appointed for me. I hereby waive my right to counsel. (signature of defendant)"

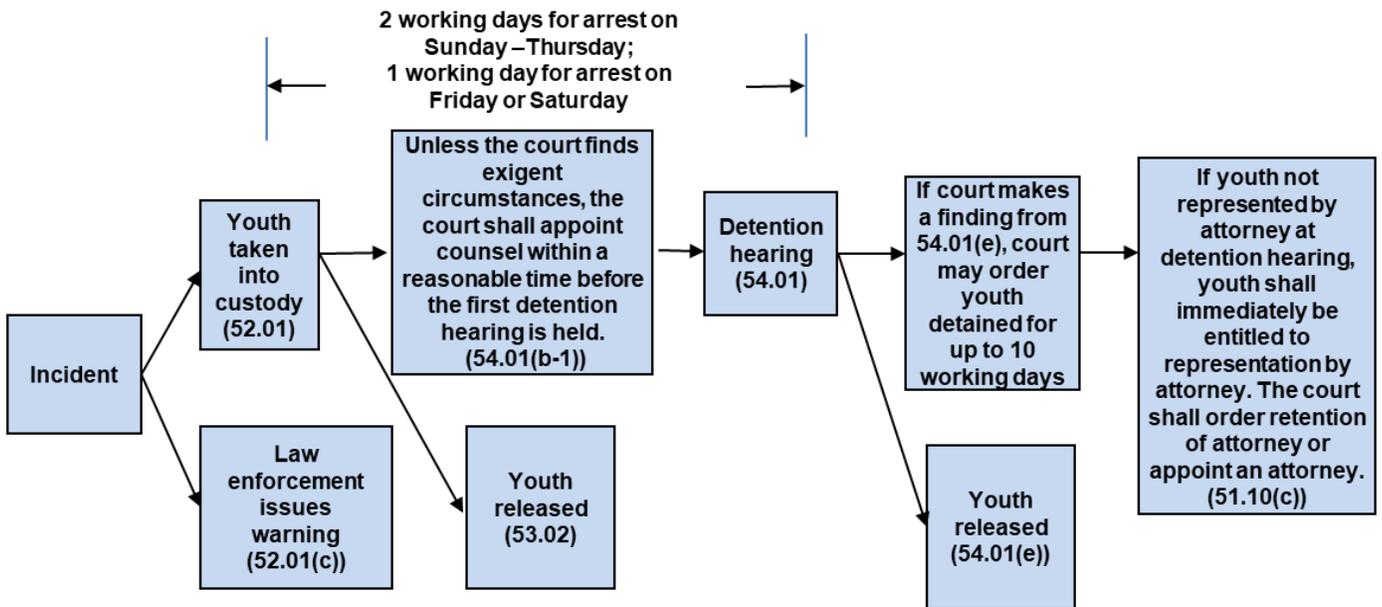
<sup>29</sup> TEX. FAM. CODE § 51.10(f).

<sup>30</sup> If the person responsible for the youth fails to retain counsel, under Section 51.10(b) of the Family Code, the youth's right to representation by an attorney shall not be waived in

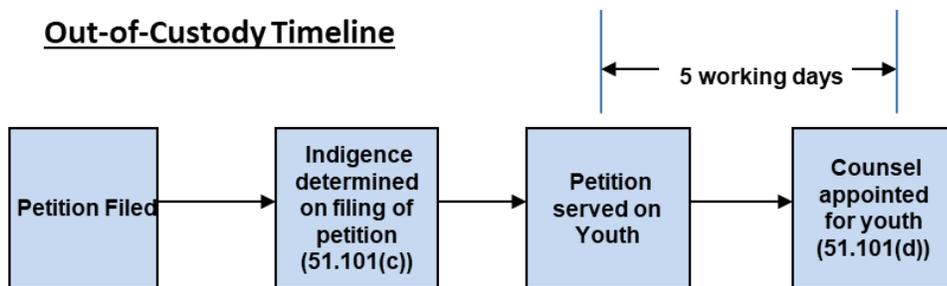
- (1) a hearing to consider transfer to criminal court as required by Section 54.02;
- (2) an adjudication hearing as required by Section 54.03;
- (3) a disposition hearing as required by Section 54.04;

**Figure 2: Timeline for Appointment of Counsel in Juvenile Cases**

**In-Custody Timeline**



**Out-of-Custody Timeline**



*Juvenile Detention Hearings*

To assess the timeliness of Brazoria County’s appointment procedures in juvenile cases, Brazoria County staff examined 35 cases filed in FY2019 (October 2018 – September 2019). Section 54.01(b-1) of the Family Code requires counsel be appointed prior to the initial detention hearing, unless appointment is not feasible due to exigent circumstances.<sup>31</sup> Of the 35 sample cases, 23 involved detention

(4) a hearing prior to commitment to the Texas Juvenile Justice Department as a modified disposition in accordance with Section 54.05(f); or

(5) hearings required by Chapter 55.

Under Section 51.10(e), the court may appoint counsel and order the person responsible for the youth to pay a reasonable attorney’s fee set by the court.

<sup>31</sup> TEX. FAM. CODE §54.01(b-1) states:

Unless the court finds that the appointment of counsel is not feasible due to exigent circumstances, the court shall appoint counsel within a reasonable time before the first detention hearing is held to represent the child at that hearing.

hearings. Counsel was present for the initial detention hearing in all 23 cases (**100% timely**), which exceeds TIDC’s 90% threshold.

*Appointment After Service of the Petition*

Under Subsections 51.101(c) and (d) of the Family Code, once a petition is served on the youth, the court has five working days to appoint counsel or order the retention of counsel for the youth. Of 35 sample cases, 21 involved service of the petition on the youth. Counsel was timely appointed or retained for 19 of these cases (**90% timely**), which meets TIDC’s 90% threshold.

**Table 7: Times to Appointment in Juvenile Cases**

	Sample Size	Number from Sample	Percent
Total juvenile cases examined	35		
<b>TIMELINESS OF COUNSEL APPOINTMENTS FOR DETENTION HEARINGS</b>			
Case files with detention hearings		23	
<b>Cases with attorney present at initial hearing</b>		<b>23</b>	<b>100%</b>
<b>TIMELINESS OF COUNSEL APPOINTMENTS WHERE YOUTH SERVED WITH A PETITION</b>			
Case files in which youth served with a petition	21		
Counsel appointed within 5 working days of service		17	
Indigence denied or counsel retained within 5 working days of service <sup>32</sup>		2	
<b>Total cases with timely presence of counsel</b>		<b>19</b>	<b>91%</b>
Cases where counsel not present in a timely fashion		2	9%

**RECOMMENDATION FOR REQUIREMENT 4**

**Appoint Counsel Promptly**

**FINDING AND RECOMMENDATION 9 (MISDEMEANOR CASES):** Brazoria County’s misdemeanor appointment process did not meet TIDC’s threshold for timely appointment of counsel (75% timely). Under Article 1.051(c)(2), the County must rule on all requests for counsel within one working day. The County must implement practices that satisfy Article 1.051(c)(2)’s timeline.

**FINDING AND RECOMMENDATION 10 (MISDEMEANOR CASES):** The absence of a ruling on a pending request raises the possibility of several statutory violations, including untimeliness (Art. 1.051(c)) and invalid waiver of counsel (Art. 1.051(f-2)). Brazoria County must ensure that its procedures for ruling on counsel requests meet the requirements of both Article 1.051(c) and 1.051(f-2).

<sup>32</sup> TIDC considered a denial of indigence to be synonymous with an order to retain counsel.

## **REQUIREMENT 5: INSTITUTE A FAIR, NEUTRAL, AND NONDISCRIMINATORY ATTORNEY SELECTION PROCESS**

Article 26.04(b)(6) of the Code of Criminal Procedure requires that local procedures for appointing counsel ensure appointments are allocated among qualified attorneys in a fair, neutral, and nondiscriminatory manner.

Brazoria County uses rotational systems of appointment for its felony, misdemeanor, and juvenile appointments. Under the rotational system, the court appoints the attorney who is next on the appointment wheel, and once an appointment is received, the attorney moves to the bottom of the list.

### **Felony and Misdemeanor Appointment Distributions**

TIDC examined the distribution of attorney appointments in Brazoria County by case level for FY2019.<sup>33</sup> TIDC attempts to consider only those attorneys who were on the appointment list for the entire year. Based on this analysis, the felony and misdemeanor court levels had appointment distributions in which the top ten percent of attorneys received less than 3.0 times their respective share of cases paid, indicating that they comply with this requirement.

### **Juvenile Appointment Distributions**

Juvenile appointments can be divided between attorney-for-the-day appointments and individual case appointments. Individual case appointments are made using the local case management system which tracks the next attorney on the list and the total number of appointments made to each attorney. All attorneys on these lists had near even numbers of appointments. These totals vary from the number of cases paid as reported on the FY2019 Indigent Defense Expense Report.

Attorney-for-the-day appointments do not follow a rotating wheel and the attorneys appointed may not have been approved for any juvenile appointment list. Instead, attorneys are appointed by individual courts for one-day assignments to handle less serious juvenile cases. The number of appointed cases disposed by attorneys-for-the-day far exceeds those of wheel of attorneys. Attorneys identified as having served as attorney-for-the-day disposed 736 juvenile cases while wheel attorneys disposed 67 juvenile cases.

TIDC could not accurately analyze distribution of juvenile appointments, because the courts were uncertain which attorneys had acted as attorneys-for-the-day. Considering the attorneys the courts believed had acted in the attorney-for-the-day capacity, the distribution of juvenile appointments to the attorney-for-the-day

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<sup>33</sup> If a jurisdiction can track its appointments, TIDC uses the jurisdiction's data. If not, TIDC uses cases paid data reported by the county auditor for this analysis.

did not meet TIDC’s threshold for presuming a fair, neutral, and nondiscriminatory appointment system.

The courts must put in place a system for appointing counsel in juvenile cases that is fair, neutral, and nondiscriminatory. The juvenile attorney-for-the-day system, as it is currently used, does not provide a fair, neutral, and nondiscriminatory appointment system.

**Table 8: Share of Cases Paid to Top 10% of Attorneys in Brazoria County (FY 2019)**

Level	Attorneys on List <sup>34</sup>	Top 10% Attorneys <sup>35</sup>	Respective Share of Cases <sup>36</sup> [Column A]	Actual Share of Cases [Column B]	Top 10% Received ‘x’ Times Their Respective Share [Col. B] / [ Col. A]
Felony	45	5	11.1%	18.8%	<b>1.7</b>
Misdemeanor	57	6	10.5%	22.0%	<b>2.1</b>
Juvenile (atty-for-the-day) <sup>37</sup>	7	1	14.3%	53.3%	<b>3.7</b>
Juvenile (all cases including attorney-for-the-day)	23	2	8.7%	62.5%	<b>7.2</b>

**FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 5**

**Attorney Selection Process**

**FINDING AND RECOMMENDATION 11 (JUVENILE CASES):** The courts must put in place a system for appointing counsel in juvenile cases that is fair, neutral, and nondiscriminatory. The juvenile attorney-for-the-day system, as it is currently used, does not provide a fair, neutral, and nondiscriminatory appointment system.

<sup>34</sup> TIDC considered an attorney had been on the list for the entire year if the attorney was on both the June 2019 list and the March 2021 list.

<sup>35</sup> The number Top 10% Attorneys is equal to the number of Attorneys on List for Entire Year multiplied by 0.10, rounded to the nearest whole number.

<sup>36</sup> The percent Respective Share of Cases is equal to the number of Top 10% Attorneys divided by the number of Attorneys on List for Entire Year.

<sup>37</sup> This analysis is not reliable. The juvenile courts could not provide the names of all attorneys who had acted in the attorney-for-the-day capacity.

## **REQUIREMENT 6: REPORT DATA REQUIRED BY STATUTE**

Under Section 79.036(e) of the Texas Government Code, the county auditor (or other person designated by the commissioners' court) must annually prepare and send indigent defense data to the Commission. This data must include the total expenses for cases in which an attorney was appointed for an indigent defendant or indigent juvenile in each district court, county court, statutory county court, and appellate court. Since FY2014, financial data reports must include attorney-level information.<sup>38</sup>

Totals reported in the IDER by the auditor's office to TIDC are consistent with numbers observed in TIDC's file review.

This report previously referenced data reported by justices of the peace to OCA as part of their monthly Judicial Council Monthly Court Activity Reports. Under Title 1 Tex. Admin. Code § 171.7 – 8, justice of the peace and municipal courts must submit monthly reports documenting the number of magistrate warnings conducted and the number of those persons who request counsel. TIDC uses these reports as a guide to understand if arrestees are informed of their right to counsel, and if they invoke that right.

TIDC found that some judges reported zero requests for counsel during FY2019, but in fact, TIDC found sample cases in which arrestees requested counsel. The justice courts must put in place methods to capture and report requests for counsel in their Judicial Council Monthly Court Activity Reports.

### **FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 6**

#### **Statutory Data Reporting**

**FINDING AND RECOMMENDATION 12:** Under Title 1 Tex. Admin. Code § 171.7, justice courts must submit monthly reports documenting the number of magistrate warnings conducted and the number of those persons who request counsel. The justice courts must put in place methods to capture and report requests for counsel in their Judicial Council Monthly Court Activity Reports.

## **Conclusion**

TIDC thanks Brazoria County officials and staff for their assistance in completing this review. TIDC will conduct a follow-up review regarding its noncompliance findings within two years.<sup>39</sup> TIDC staff stand ready to provide

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<sup>38</sup> TEX. GOV'T CODE § 79.036(a-1).

<sup>39</sup> 1 TEX. ADMIN. CODE § 174.28(c)(2).

technical and financial assistance to remedy these issues and ensure full compliance with the Fair Defense Act.

## **Summary of Findings and Recommendations**

Brazoria County must respond in writing how it will address the report's findings.

### **REQUIREMENT 1: CONDUCT PROMPT AND ACCURATE MAGISTRATION PROCEEDINGS.**

**FINDING AND RECOMMENDATION 1:** Article 15.17(e) of the Code of Criminal Procedure requires magistrates to ask and record whether each defendant requests counsel. Brazoria County magistrates must ask and record whether each defendant requests counsel.

**FINDING AND RECOMMENDATION 2:** If a defendant requests counsel, under Article 15.17(a), the magistrate must ensure reasonable assistance is provided in completing the forms necessary for requesting counsel.

**FINDING AND RECOMMENDATION 3:** Under Article 15.17(a), requests for counsel must be transmitted to the appointing authority within 24 hours. For those defendants able to request counsel at the Article 15.17 hearing, TIDC did not observe any process for transmitting those requests to the appointing authority within 24 hours.

### **REQUIREMENT 2: DETERMINATION OF INDIGENCE.**

**FINDING AND RECOMMENDATION 4:** Indigence determinations must comply with Article 26.04(m) and *Abdnor v. State*. Indigence determinations may not consider the income of persons who are not legally bound to pay for the defendant's legal expenses.

**FINDING AND RECOMMENDATION 5:** In misdemeanor cases, courts do not appoint counsel for defendants who they found to be partially indigent but who report they are unable to pay the \$100 fee, indicating they are also unable to retain counsel. If the courts find a defendant is unable to retain counsel, the courts must appoint counsel for the defendant.

**FINDING AND RECOMMENDATION 6:** In misdemeanor cases, an attorney-for-the-day is periodically used. When the attorney-for-the-day is used, the courts must ensure the attorney continues to represent the defendant until the case is disposed or the court finds good cause on the record for the attorney to withdraw from the case.

**REQUIREMENT 3: ESTABLISH MINIMUM ATTORNEY QUALIFICATIONS.**

**FINDING AND RECOMMENDATION 7:** In misdemeanor cases, the attorney-for-the-day is not described in the indigent defense plan. If the courts intend to use the attorney-for-the-day in adult criminal cases, the courts must describe its use in the local indigent defense plan.

**FINDING AND RECOMMENDATION 8:** Several attorneys acting as juvenile attorney-for-the-day were not approved for any juvenile appointment list. Article 26.04(a) requires the court to appoint attorneys from a public appointment list. The juvenile courts must only appoint attorneys who were approved for a juvenile appointment list.

**REQUIREMENT 4: APPOINT COUNSEL PROMPTLY.**

**FINDING AND RECOMMENDATION 9 (MISDEMEANOR CASES):** Brazoria County's misdemeanor appointment process did not meet TIDC's threshold for timely appointment of counsel (75% timely). Under Article 1.051(c)(2), the County must rule on all requests for counsel within one working day. The County must implement practices that satisfy Article 1.051(c)(2)'s timeline.

**FINDING AND RECOMMENDATION 10 (MISDEMEANOR CASES):** The absence of a ruling on a pending request raises the possibility of several statutory violations, including untimeliness (Art. 1.051(c)) and invalid waiver of counsel (Art. 1.051(f-2)). Brazoria County must ensure that its procedures for ruling on counsel requests meet the requirements of both Article 1.051(c) and 1.051(f-2).

**REQUIREMENT 5: ATTORNEY SELECTION PROCESS.**

**FINDING AND RECOMMENDATION 11 (JUVENILE CASES):** The courts must put in place a system for appointing counsel in juvenile cases that is fair, neutral, and nondiscriminatory. The juvenile attorney-for-the-day system, as it is currently used, does not provide a fair, neutral, and nondiscriminatory appointment system.

**REQUIREMENT 6: STATUTORY DATA REPORTING.**

**FINDING AND RECOMMENDATION 12:** Under Title 1 Tex. Admin. Code § 171.7, justice courts must submit monthly reports documenting the number of magistrate warnings conducted and the number of those persons who request counsel. The justice courts must put in place methods to capture and report requests for counsel in their Judicial Council Monthly Court Activity Reports.

## Appendix: Monitoring Review Checklist

The monitoring review of the FDA's core requirements consisted of an examination of the items from the following checklist. If a box is marked, the specific requirement was met. If a box is not marked, the requirement either was not satisfied or is not applicable.

### REQUIREMENT 1: CONDUCT PROMPT AND ACCURATE ARTICLE 15.17 PROCEEDINGS

- The accused must be brought before a magistrate within 48 hours of arrest.<sup>40</sup>
  - A person arrested for a misdemeanor without a warrant must be released on bond in an amount no more than \$5,000 not later than 24 hours after arrest if a magistrate has not determined probable cause by that time.<sup>41</sup>
- The magistrate must inform and explain the right to counsel and the right to appointed counsel to the accused.<sup>42</sup>
- The magistrate must ensure that reasonable assistance in completing forms necessary to request counsel is provided to the accused.<sup>43</sup>
- A record must be made of the following:
  - the magistrate informing the accused of the accused's right to request appointment of counsel;
  - the magistrate asking whether accused wants to request appointment of counsel;
  - and whether the person requested court appointed counsel.<sup>44</sup>
- If authorized to appoint counsel, the magistrate must do so within one working day after receipt of request for counsel in counties with a population of 250,000 or more and within three working days in counties under 250,000.<sup>45</sup>
- If not authorized to appoint counsel, the magistrate must transmit or cause to be transmitted to the appointing authority an accused's request for counsel within 24 hours of the request being made.<sup>46</sup>

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<sup>40</sup> TEX. CODE CRIM. PROC. art. 14.06(a).

<sup>41</sup> TEX. CODE CRIM. PROC. art. 17.033.

<sup>42</sup> TEX. CODE CRIM. PROC. art. 15.17(a). This box is not checked because magistrates did not always inform defendants that defendants can request counsel at the hearing.

<sup>43</sup> *Id.* This box is not checked because assistance with financial forms is not provided at the time of the Article 15.17 hearing.

<sup>44</sup> TEX. CODE CRIM. PROC. art. 15.17(e). This box is not checked because magistrates do not always ask defendants if they want to request appointed counsel.

<sup>45</sup> *See, e.g.*, TEX. CODE CRIM. PROC. art. 15.17(a) (requiring magistrate to appoint counsel according to the timeframes set in TEX. CODE CRIM. PROC. art. 1.051); TEX. CODE CRIM. PROC. art. 1.051(c) (spelling out timeframe for appointment of counsel by county population size). This box is not applicable.

<sup>46</sup> TEX. CODE CRIM. PROC. art. 15.17(a). This box is not checked because TIDC did not observe any procedure to promptly transmit requests made at the hearing to the appointing authority.

**REQUIREMENT 2: DETERMINE INDIGENCE ACCORDING TO STANDARDS DIRECTED BY THE INDIGENT DEFENSE PLAN.**

- Provide detailed procedures used to determine whether a defendant is indigent.<sup>47</sup>
- State the financial standard(s) to determine whether a defendant is indigent.<sup>48</sup>
- List factors the court will consider when determining whether a defendant is indigent.<sup>49</sup>

**REQUIREMENT 3: ESTABLISH MINIMUM ATTORNEY QUALIFICATIONS.**

- Establish objective qualification standards for attorneys to be on an appointment list.<sup>50</sup>
  - Standards must require attorneys to complete at least six hours of continuing legal education pertaining to criminal / juvenile law during each 12-month reporting period or be currently certified in criminal law by the Texas Board of Legal Specialization.<sup>51</sup>
  - Standards must require attorneys to submit by October 15 each year the percentage of the attorney's practice time dedicated to indigent defense based on criminal and juvenile appointments accepted in this county. The report must be made on a form prescribed by the Texas Indigent Defense Commission for the prior 12 months that begins on October 1 and ends on September 30.<sup>52</sup>

**REQUIREMENT 4: APPOINT COUNSEL PROMPTLY (JUVENILES).**

- Unless the court finds that the appointment of counsel is not feasible due to exigent circumstances, the court shall appoint counsel within a reasonable time before the first detention hearing is held to represent the child at that hearing.<sup>53</sup>
- If the child was not detained, an attorney must be appointed on or before the fifth working day after the date the petition for adjudication, motion to modify, or discretionary transfer hearing was served on the child.<sup>54</sup>

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<sup>47</sup> TEX. CODE CRIM. PROC. art. 26.04(l)–(r).

<sup>48</sup> TEX. CODE CRIM. PROC. art. 26.04(l).

<sup>49</sup> TEX. CODE CRIM. PROC. art. 26.04(m). This box is unchecked because the income of non-spouses was considered in making determinations of indigence in adult criminal cases.

<sup>50</sup> TEX. CODE CRIM. PROC. art. 26.04(d). This box is unchecked because use of the attorney-for-the-day is not described in the indigent defense plan.

<sup>51</sup> 1 TEX. ADMIN. CODE § 174.1–4.

<sup>52</sup> TEX. CODE CRIM. PROC. art. 26.04(j)(4).

<sup>53</sup> TEX. FAM. CODE § 54.01(b-1). TEX. FAM. CODE § 51.10(c).

<sup>54</sup> TEX. FAM. CODE § 51.101(d).

**REQUIREMENT 4: APPOINT COUNSEL PROMPTLY (ADULTS).**

- Incarcerated persons: After receipt of a request for counsel, counsel must be appointed within one working day in counties with a population of 250,000 or more and within three working days in counties under 250,000.<sup>55</sup>
- Persons out of custody: Counsel must be appointed at the defendant’s first court appearance or when adversarial judicial proceedings are initiated, whichever comes first.<sup>56</sup>
- All unrepresented defendants must be advised of the right to counsel and the procedures for obtaining counsel.<sup>57</sup>

**REQUIREMENT 5: INSTITUTE A FAIR, NEUTRAL, AND NONDISCRIMINATORY ATTORNEY SELECTION PROCESS.**

- Rotational method: The court must appoint an attorney from among the next five names on the appointment list in the order in which the attorneys’ names appear on the list, unless the court makes a finding of good cause on the record for appointing an attorney out of order.<sup>58</sup>
- Public Defender: The system must meet the requirements set out in Article 26.044 of the Code of Criminal Procedure. The appointment process must be listed in the indigent defense plan.<sup>59</sup>

**NOT APPLICABLE:** The County does not have a public defender.

- Alternative appointment method:<sup>60</sup>
  - The local processes must be established by a vote of two-thirds of the judges.
  - The plan must be approved by the presiding judge of the administrative judicial region.
  - The courts must allocate appointments reasonably and impartially among qualified attorneys.

**NOT APPLICABLE.**

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<sup>55</sup> TEX. CODE CRIM. PROC. art. 1.051(c).

<sup>56</sup> TEX. CODE CRIM. PROC. art. 1.051(j); *see also Rothgery v. Gillespie Cnty.*, 554 U.S. 191, 212 – 13 (2008) (holding that “a criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel.”). This box is not checked because several defendants requested counsel but made bail before being screened for indigence. Their requests often resulted in late appointments or no rulings on their requests.

<sup>57</sup> TEX. CODE CRIM. PROC. art. 1.051(f-2). This box is not check because some misdemeanor defendants requested counsel but entered uncounseled pleas without their requests being ruled upon.

<sup>58</sup> TEX. CODE CRIM. PROC. art. 26.04(a). This box is not checked because the distribution of appointments in juvenile cases did not meet TIDC’s presumptive threshold for a fair, neutral, and nondiscriminatory appointment system.

<sup>59</sup> TEX. CODE CRIM. PROC. art. 26.044.

<sup>60</sup> TEX. CODE CRIM. PROC. art. 26.04(g)–(h).

## **REQUIREMENT 6: STATUTORY DATA REPORTING**

- The county auditor shall prepare and send to OCA an annual report of legal services provided in the county to indigent defendants during the fiscal year and an analysis of the amount expended:<sup>61</sup>
  - In each district, statutory county, and appellate court;
  - In cases for which a private attorney is appointed for an indigent defendant;
  - In cases for which a public defender is appointed for an indigent defendant;
  - In cases for which counsel is appointed for an indigent juvenile; and
  - For investigation expenses, expert witness expenses, or other litigation expenses.

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<sup>61</sup> This box is not checked because Judicial Council Monthly Court Activity Report (submitted to OCA) by justice courts did not always include requests for counsel made by defendants.